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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NINE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 4, 1985

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QUESTIONS PRESENTED

1. Did investors in tax-exempt revenue bonds issued by the Washington Public Power Supply System ("Supply System") to finance construction of two of its nuclear projects have a property interest that was taken by the Washington Supreme Court when it determined that:

(a) No Washington statute authorized cities and public utility districts in that state to enter a complex contractual arrangement with the Supply System (the "Participants' Agreement") for the purchase and redistribution of the projects' generation capability;

(b) No doctrine of Washington law otherwise permitted enforcement of the Participants' Agreement against those Washington municipal entities, which had purchased approximately 70% of the project capability of the two nuclear plants; and

(c) Lacking 70% of the contractual undertaking, the Participants' Agreement was unenforceable against the remaining participants under well-established principles of state law governing contract formation and performance?

2. Did the Supreme Court of Washington deny any due process rights of investors in tax-exempt revenue bonds issued by the Supply System when it determined as a matter of law, upon undisputed facts and in accordance with the procedural rules of Washington state courts, that the Participants' Agreement exceeded the statutory authority of Washington cities and public utility districts and was therefore unenforceable against the remaining participants?

PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by nine utilities that are respondents herein and were respondents below. The "Nine Respondents" are as follows:

Big Bend Electric Cooperative, Inc., Washington;
Lincoln Electric Cooperative, Inc., Washington;
City of Milton-Freewater, Oregon;
Missoula Electric Cooperative, Inc., Montana;
Ravalli County Electric Cooperative, Inc., Montana;
Salmon River Electric Cooperative, Inc., Idaho;
Tanner Electric Cooperative, Washington;
Vera Irrigation District No. 15, Washington; and
Vigilante Electric Cooperative, Inc., Montana.

The Petition for Certiorari incorrectly identifies two of the Nine Respondents. Vera Irrigation District No. 15 is incorrectly identified as Vera Irrigation District No. 10, and Ravalli County Electric Cooperative, Inc. is incorrectly identified as 'Pavelli' County Electric Cooperative, Inc.

None of the Nine Respondents has any subsidiaries or other affiliates. The Nine Respondents are unaware of any affiliates or subsidiaries of other respondents.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Introduction 1
Background 1
Proceedings Below 8
Related Litigation 11

Reasons for Denying the Writ 13

1. No Question Arises Under the Takings Clause 14

(a) There Has Been No Interference With Reasonable Investment-Backed Expectations 15

(b) There Has Been No Governmental Action Characteristic of Taking 18

(c) The Extent of Diminution in Value is Uncertain 20

2. No Question Arises Under the Due Process Clause 21

3. Review of this Case Would Constitutionalize Every Case Involving Municipal Default, Fraud Claims Against Municipal Corporations or Judicial Determinations of Municipal Authority 25

Conclusion 27

Appendix A A-1

TABLE OF AUTHORITIES

PAGE

Cases

Andrus v. Allard, 444 U.S. 51 (1979) 19, 20

Armstrong v. United States, 364 U.S. 40 (1960) 14

Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), *cert. denied*, 105 S. Ct. 219 (1984) 11

Barnett v. City of Denison, 145 U.S. 135 (1892) 18

Benton County Public Utility District No. 1 v. United States, Nos. 590-82C, 514-83C (Ct. Cl. filed Nov. 15, 1982) 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 14

Chemical Bank v. Public Utility District No. 1 of Benton County, No. C83-1080 (W.D. Wash. filed Aug. 3, 1983) 13

Chemical Bank v. Washington Public Power Supply System, 102 Wash. 2d 874, 691 P.2d 524 (1984) (*Chemical Bank II*) ..... *passim*

Chemical Bank v. Washington Public Power Supply System, 99 Wash. 2d 772, 666 P.2d 329 (1983) (*Chemical Bank I*) 9, 10, 23, 24

Chemical Bank v. Washington Public Power Supply System, No. 82-2-06840-3 (Super. Ct. King County Aug. 11, 1982) 9, 10

City of Springfield v. Washington Public Power Supply System, Nos. 83-3927, 83-4024 (9th Cir. Feb. 4, 1985) 3

Cross Lake Shooting and Fishing Club v. Louisiana, 224 U.S. 632 (1912) 17

DeFazio v. Washington Public Power Supply System, 296 Or. 550, 679 P.2d 1316 (1984) 8, 11

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944) 26

Estelle v. Gamble, 429 U.S. 97 (1976) 13, 26

Haberman v. Washington Public Power Supply System, No. 84-2-06452-8 (Super. Ct. King County filed May 7, 1984) 13

Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) 17

In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794 (10th Cir. 1980) 25

In re Virginia Electric & Power Co., 539 F.2d 357 (4th Cir. 1976) 25

In re Washington Public Power Supply System Securities Litigation, M.D.L. No. 551 (W.D. Wash. consolidated Aug. 5, 1983) 12

Kelly v. Aetna Casualty & Surety Co., 100 Wash. 2d 401, 670 P.2d 267 (1983) 24

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 24

Lynch v. United States, 292 U.S. 571 (1934) 14

Mariniello v. Shell Oil Co., 511 F.2d 853 (3d Cir. 1975) 21

Merchants Exchange National Bank v. Board of Chosen Free Holders, 115 U.S. 384 (1885) 18

M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, No. C84-690 (W.D. Wash. filed May 23, 1984) 13, 16

Miller v. Schoene, 276 U.S. 272 (1928) 19

Minish v. Hanson, 64 Wash. 2d 113, 390 P.2d 704 (1964) 17

Moore v. City of Nampa, 276 U.S. 536 (1928) 17

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 24

Noel v. Cole, 98 Wash. 2d 375, 655 P.2d 245 (1982) .. 17, 19

Northern National Bank v. Trustees of Porter Township, 110 U.S. 608 (1884) 17

Pacific Power & Light Co. v. Public Service Commission, 677 P.2d 799 (Wyo.), *cert. denied*, 105 S. Ct. 120 (1984) 11

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 14, 19

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 19

Pennsylvania Power & Light Co. v. Gulf Oil Corp., 270 Pa. Super. 514, 411 A.2d 1203 (1979), *cert. denied*, 446 U.S. 966 (1980) 25

Public Utility District No. 1 of Clallam County v. United States, No. 29-83C (Ct. Cl. filed Jan. 17, 1983) 12

Public Utility District No. 1 of Snohomish County v. Taxpayers of Snohomish County, 78 Wash. 2d 724, 479 P.2d 61 (1971) 22

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 13

Roehl v. Public Utility District No. 1 of Chelan County, 43 Wash. 2d 214, 261 P.2d 92 (1953) 21

Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984) 15

Sauer v. City of New York, 206 U.S. 536 (1907) 26

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 21

United States v. Causby, 328 U.S. 256 (1946) 14

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 20

Washington v. Maricopa County, 152 F.2d 556 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1946) 18

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 14, 15, 16, 20, 21

Constitutional Provisions and Statutes

U.S. Const. amend. V, cl. 4. 14

U.S. Const. amend. XIV, § 1, cl. 3 21

16 U.S.C. § 825s (1974) 2

16 U.S.C. § 832b (1974) 2

16 U.S.C. § 832c (1974) 2

Other Authorities

Brown, *Whoops: Darkness to Dawn*, Washington Post, Dec. 2, 1984 1

Deposition Testimony of Rosalyn Mirotznick, *In re Washington Public Power Supply System Securities Litigation* (Jan. 28 and 29, 1985) A-1, A-2

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1

STATEMENT OF THE CASE

Introduction

As many as 113 nuclear generating plants across the nation have been terminated prior to completion within the past 12 years, occasioning losses of billions of dollars.[1] This case involves the termination of two nuclear plants that were being built by the Washington Public Power Supply System ("Supply System").

Like shareholders and investors in other companies involved in nuclear generation, investors in revenue bonds issued for Supply System Nuclear Projects Nos. 4 and 5 are disappointed with the losses they have realized due to problems in the nuclear industry. They are distressed that the Supreme Courts of Washington and Idaho did not construe the enabling statutes of municipal corporations as broadly as was anticipated by the architects of the complex financing scheme for those projects. They also take issue with the Washington court's determination that the Participants' Agreement for Projects 4 and 5 was invalid and unenforceable under fundamental principles of contract law. Neither of those rulings, however, nor any action of the participant utilities in Projects 4 and 5, raises a federal constitutional question.

Background

For many years, hydroelectric power has been the chief component of electricity generated in the Pacific Northwest. The federal government assumed the primary role in generation and transmission of hydroelectric power by creating the Bonneville Power Administration ("Bonneville") to develop the Columbia River Hydroelectric System. Bonneville delivers power to public and private utilities throughout the Northwest by means of a large integrated transmission grid.

Under federal law, municipalities, public utility districts ("PUDs"), and rural electric cooperatives are entitled to preferential treatment in purchasing power from Bonneville. 16

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1. Brown, *Whoops: Darkness to Dawn*, Washingon Post, Dec. 2, 1984, at 1, col. 2.

U.S.C. §§ 832c, 825s (1974). These public or consumer-owned utilities are called "preference customers" and have priority to receive available power over other customers of Bonneville.[2] Bonneville also sells power to privately owned utilities, known as "investor-owned utilities," and private industries purchasing large quantities of electricity directly from Bonneville, sometimes called "direct service industries."

In addition to their preference rights, smaller preference customers have power sales contracts with Bonneville that guarantee up to 25 megawatts of electricity from the pool of power available from Bonneville. This so-called "25-megawatt umbrella" was intended to provide substantial protection to small consumer-owned utilities who could not feasibly generate their own power.

In the 1960's, Bonneville began to forecast that the region's hydroelectric resources would be exhausted by the early 1980's. Consequently, the Ten-year Hydrothermal Power Program, developed in 1968 under Bonneville's leadership, called for the construction of several nuclear and other thermal power plants during the 1970's for commercial operation commencing in the 1980's.

Since Bonneville was itself not authorized to construct or own thermal generating plants, the Supply System commenced construction of three nuclear projects in the early 1970's pursuant to "Net Billing Agreements" executed by Bonneville, the Supply System, and numerous public and consumer-owned utilities in the region. Private investor-owned utilities also owned a part of one of those nuclear projects. Under a contract with the Supply System, Bonneville oversaw construction of these three plants.

Through net billing, Bonneville provided financial backing for those projects and thereby obtained additional generating capability for sale to other preference and private customers. Under this arrangement, the Supply System issued tax-exempt

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2. Although rural electric cooperatives are legally organized as private corporations under certain business and corporation statutes of their respective states, they are nevertheless regarded as preference customers under federal law so long as they qualify as non-profit organizations. *See* 16 U.S.C. § 832b (1974).

municipal bonds to finance construction of the nuclear plants and sold shares of the plants' generating capability to "participants" in those projects, who were also preference customers of Bonneville. Those participants then assigned their shares of project capability in Projects 1, 2, and 3 to Bonneville in exchange for "credits" applied to their power purchase accounts with Bonneville. Since Bonneville was obligated to give credits for amounts paid by participants to the Supply System whether or not those projects generated power, Bonneville effectively assumed the "dry-hole risk." The cost to Bonneville of allowing credits for nuclear project capability assigned to it by the participants was melded into Bonneville's rate base and thereby spread throughout the region to many of its public and private customers. Essentially, the net-billing mechanism allowed Bonneville to obtain additional electricity for its Pacific Northwest transmission system without running afoul of its legal inability to acquire a direct ownership interest in thermal generating plants.[3]

By the mid-1970's, Bonneville projected sufficient growth in regional demand for electricity to require construction of additional thermal generating plants. For several reasons, however, Bonneville was unable to employ the net-billing mechanism for additional plants.[4] Bonneville therefore unveiled Phase II of the Hydrothermal Power Program, which called for the construction of additional thermal generating plants by the Supply System under a different arrangement.

The early drafts of agreements for participation in Supply System Projects 4 and 5 (hereinafter sometimes referred to as the "Projects") went through several transformations. Some drafts involved Bonneville in a "trust-agent" capacity. Since

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3. The validity of the Net Billing Agreements was upheld in *City of Springfield v. Washington Public Power Supply System*, Nos. 83-3927, 83-4024, slip. op. (9th Cir. Feb. 4, 1985).

4. Two reasons are commonly cited for discontinuation of the net-billing mechanism. First, a ruling of the Internal Revenue Service disallowed the issuance of tax-exempt bonds for any additional projects if a substantial percentage of the output of those projects was to be sold to non-exempt entities. Second, because the cost of nuclear power was higher than the cost of hydroelectric power, there were practical limits to the amount of net-billing credits that could be applied to Bonneville accounts.

power from these Projects would also be sold to large aluminum and chemical companies, other proposals explored the participation of Bonneville's industrial customers in the contractual arrangement. Ultimately, because of difficulties with those proposals and the perceived urgency to begin construction in order to forestall energy shortages projected to occur as early as 1983, Bonneville distributed the Participants' Agreement in its present form only to its preference customers and urged their participation.

Like its predecessor agreements, the Participants' Agreement involved a complex arrangement for constructing and financing the Supply System Projects. Each participant purchased a "participant's share" of the "project capability" or output of the Projects. In exchange, each participant was obligated to pay its participant's share of the annual budget prepared by the Supply System to cover the costs associated with construction and operation of the Projects. The Agreement included so-called "take-or-pay" and "hell-or-high-water" clauses which, as understood by the Nine Respondents, imposed payment obligations on participants, so long as the contract was valid, whether or not the Projects actually produced power and whether or not the participants had a current need for the power.

Until this time, utilities dependent on Bonneville to supply all of their power had normally been obligated to pay only for whatever power they needed or used. Even the Net Billing Agreements for Projects 1, 2, and 3 had provided such protection through net billing credits. Consequently, small utilities that projected no immediate need to acquire additional commitments of power were wary of obligating themselves to purchase the full amount of their share of the Projects' output without some assurance that output in excess of their individual requirements could be assigned to other utilities or industries that needed the power. To accomplish this redistribution, an Assignment Agreement was drawn up to accompany the Participants' Agreement. Under the Assignment Agreement, each participant could assign to the Supply System all or part of its share of project capability for a period of approximately ten years according to a schedule submitted to the Supply System on an annual basis. That energy would then be distributed by the Supply System to other public utilities, to Bonneville, or to

certain industrial customers of Bonneville that agreed to purchase power from the Projects.

Even with this mechanism for redistribution, many small preference customers with loads well under the 25 megawatt guarantee still believed and informed Bonneville that they did not perceive a need to participate in the Projects. They reasoned that the statutory preference and 25-megawatt umbrella provided them with sufficient protection from future shortages or curtailment by Bonneville.

To meet the resistance of its smaller preference customers, Bonneville informed those utilities that they needed to sign the Participants' Agreement in order to obtain additional generating capacity for the entire region. Bonneville suggested that it needed the participation of preference customers to demonstrate broad regional support for additional power plants and enhance the prospects of legislation authorizing Bonneville to participate directly in thermal generating facilities. Bonneville strongly encouraged utilities to sign the Agreement regardless of their individual circumstances and despite the protection otherwise afforded them by their preference rights and the 25-megawatt umbrella. In fact, Bonneville warned the smaller utilities that even if they did not project future needs beyond the 25 megawatt guarantee, they would nevertheless share in and experience the same shortages and curtailments facing the larger public and private utilities in the region. This mutual interdependence of utilities sharing Bonneville's transmission grid was captured in Bonneville's "one short, all short" theme—a powerful tool in inducing preference customers to subscribe to the Projects.

Further inducement to persuade the preference customers to sign the Participants' Agreement came with a "notice of insufficiency" issued by Bonneville only several weeks before the Agreement was circulated for consideration and signature. The notice of insufficiency warned all preference customers of a projected power shortage commencing July 1, 1983. In effect, participants were told that they would be short of energy without the Projects. Bonneville's notice of insufficiency also warned that as of July 1983, it would be unable to fulfill its contractual obligations to preference customers, including the

25 megawatt guarantee, unless those preference customers assisted Bonneville in acquiring additional generation capability for the region by signing the Participants' Agreement.

Under those circumstances, without any reasonable alternative source of power, 88 preference customers signed the Participants' Agreement in order to assure future power supply for the entire region. They believed, as Bonneville had told them, that "we are all in this together." Eighty-seven of the 88 participants also executed the Assignment Agreement and thereby assigned most of their share of the Projects' output during the first years of anticipated operation to other utilities and private industrial customers in the Northwest. Forty-three of the 88 participants anticipated surplus project capability for assignment to other utilities as far into the future as 1992. Based upon those projections, power from the Projects was committed for resale to private aluminum and chemical companies in the region.

The petitioners' allegation that participants entered the Participants' Agreement to obtain electrical power at cost solely for the benefit of their constituencies is unfair and misleading. Instead, many participants entered the Participants' Agreement not to satisfy any immediate need for their own constituencies, but rather to assist other public and private utilities throughout the region to obtain adequate power.

The petitioners also mislead this Court by suggesting that participants controlled the destiny of the Projects. Although the Participants' Agreement established a committee of participant representatives to monitor the Supply System's construction and management of the Projects, the powers of the committee were extremely limited. Among other things, the "Participants' Committee," consisting of only seven part-time volunteer laypersons, was authorized to review only certain Supply System actions. Affirmative approval by the committee was not required for Supply System proposals; instead, they were deemed approved unless the Supply System received a formal disapproval from the committee within 15 days of delivering its proposal. The Participants' Committee had no means of implementing its own recommendations without the approval of the Supply System or an outside arbitrator. Moreover, even when

the committee disapproved a Supply System proposal, it could merely force the proposal to be reviewed by an arbitrator in accordance with a standard of "prudent utility practice." Any Supply System proposal that satisfied the prudent utility practice standard could automatically be implemented, despite disapproval or objection by the Participants' Committee.

Commencing in 1977, the Supply System issued $2.25 billion in bonds to finance construction of the Projects. Unfortunately, events did not occur as Bonneville and the Supply System had anticipated. Economic recession, especially acute in the Pacific Northwest, flattened the growth in power demand that Bonneville had forecasted. Increasingly strict regulations of the Nuclear Regulatory Commission, partially attributable to the accident at Three Mile Island, required substantial redesign and caused significant increases in the costs of constructing nuclear plants. Strikes and other labor problems slowed the construction of all five Supply System nuclear projects. Finally, conservation and alternative energy resources provided a substantial savings of energy not earlier envisioned by the planners at Bonneville.

By May 1981, the Supply System determined that it could not borrow enough money to continue full-scale construction of the Projects. The majority of participants, still convinced that the Projects would be needed for the region, loaned substantial amounts of money to the Supply System to assist in "mothballing" the Projects. However, the direct service industries, which expected to receive power from the Projects pursuant to the Assignment Agreements, declined to participate in the mothballing program.

By January 22, 1982, the Supply System determined that completion of the Projects was impossible and therefore terminated them, to the dismay of most participants. Many participants then made additional loans to the Supply System to assist in the orderly liquidation of assets of the Projects.[5]

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5. Every one of the Nine Respondents made loans to the Supply System in connection with mothballing or termination of the Projects.

The petitioners' statement that participants repudiated their obligations under the Participants' Agreement is unfounded and untrue. None of the Nine Respondents repudiated any lawful obligations under the Participants' Agreement. Certain other participants, charged with public and fiduciary duties of stewardship of their ratepayers' funds, raised specific questions about the interpretation of the Participants' Agreement. Ratepayers also filed actions questioning the authority of certain participants to enter the Participants' Agreement. However, many utilities, including the Nine Respondents, were brought into this litigation involuntarily by the petitioners. Only after certain facts were generated in pre-trial discovery did many utilities even raise questions about the circumstances under which the Agreement was signed.

Moreover, even though important issues were raised in connection with the validity of the Participants' Agreement, a vast majority of the participants demonstrated a good-faith willingness to perform any obligations that they had under the Agreement by depositing payments totalling approximately $34 million in a court-administered escrow during the pendency of the proceedings below. Consequently, the participants, particularly the Nine Respondents, were not "repudiators" of their obligations under the Participants' Agreement, as the petitioners have unfairly alleged.

Proceedings Below

In May 1982, petitioner Chemical Bank filed a declaratory action in the Superior Court of Washington for King County.[6] In that action, Chemical Bank, as trustee for all holders of bonds for Supply System Projects 4 and 5, sought a judgment declaring that participants in the Projects were obligated under the Participants' Agreement to make payments to the Supply System sufficient in amount to pay principal and interest on the revenue bonds issued for those Projects.

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6. Prior to Chemical Bank's action, none of the Nine Respondents was involved in litigation pertaining to the Projects except the City of Milton-Freewater, Oregon, which argued in an action commenced by ratepayers in Oregon that it possessed authority to enter the Participants' Agreement. *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984).

When Chemical Bank and the Supply System moved for summary judgment in the fall of 1982, the trial court interpreted the Participants' Agreement to impose the dry-hole risk upon participants. The trial court also determined that Washington participants had authority to execute the Participants' Agreement. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 3-4 (Super. Ct. King County Nov. 16, 1982) Order on Motions for Summary Judgment (Appendix to Petition for Certiorari at E-3). The trial court subsequently ruled that rural electric cooperatives in several states possessed authority to enter the Participants' Agreement, but deferred to the Idaho Supreme Court and the Oregon Circuit Court, where actions were then pending, to determine whether Idaho and Oregon cities and PUDs possessed authority to enter the Participants' Agreement. Certain participants then sought direct and accelerated review by the Washington Supreme Court of the trial court's order, and the Washington Supreme Court granted such review.

On June 15, 1983, the Washington Supreme Court reversed the trial court and held that the Participants' Agreement was *ultra vires* and beyond the powers specifically granted to Washington cities and PUDs. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) (hereinafter cited as *Chemical Bank I*) (Appendix B to Petition for Certiorari). After reviewing statutes that granted to Washington cities and PUDs the powers to purchase electricity, acquire electric generating facilities, and participate in joint operating agreements, the court determined that those statutes did not authorize execution of the Participants' Agreement, which imposed upon participants a dry-hole obligation without affording them the requisite accompanying rights of ownership or control over the Projects. 99 Wash. 2d at 782-91 (Appendix to Petition for Certiorari at B-10-18).

The *Chemical Bank I* opinion left a gaping hole in the Participants' Agreement. The Agreement had been declared *ultra vires* as to Washington cities, towns, and PUDs that held 70% of the participants' shares in the Projects. Upon return of the case to the trial court for further proceedings consistent with the *Chemical Bank I* opinion, the trial court determined on motions for summary judgment filed by the remaining participants that

under state contract law the Participants' Agreement was therefore invalid and unenforceable against all remaining participants by reason of (a) contract indivisibility and the failure of the condition of substantially 100% participation in the Projects, (b) mutual mistake as to the authority of Washington PUDs and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 2-3 (Super. Ct. King County Aug. 11, 1983) Order and Judgment (Appendix to Petition for Certiorari at D-2-3). The trial court also declared that Chemical Bank and the Supply System could not circumvent the *ultra vires* doctrine and had not demonstrated any basis to impose payment obligations upon the remaining participants under state law theories of waiver, estoppel, laches, ratification, restitution, unjust enrichment, Article 8 of the Uniform Commercial Code, or alleged control by the participants. *Id.* Finally, on motions for reconsideration filed by the petitioners herein, the trial court determined that neither the state nor federal constitution had been violated in this proceeding. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 2 (Super. Ct. King County Sept. 16, 1983) Order Denying Motion for Reconsideration of Order and Judgment (Appendix to Petition for Certiorari at C-2).

Chemical Bank and the Supply System then sought reconsideration of the *Chemical Bank I* opinion, as well as review of the subsequent trial court determination that the Participants' Agreement was unenforceable against all remaining participants. After extensive briefing and oral argument, the Washington Supreme Court affirmed its prior decision in *Chemical Bank I* and upheld the Order and Judgment entered by the trial court. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) (hereinafter cited as *Chemical Bank II*) (Appendix A to Petition for Certiorari). The Washington Supreme Court also determined that there had been no taking of property without just compensation, no impairment of contract, and no denial of due process under the federal and state constitutions.

Related Litigation

The termination of Supply System Projects 4 and 5 has generated a substantial amount of litigation of which this Court should be aware in considering this petition for certiorari.

Validity of the Participants' Agreement

Ratepayers in several states commenced actions to determine the validity of the Participants' Agreement executed by their utilities. In *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G to Petition for Certiorari), the Oregon Supreme Court reversed the trial court and determined that Oregon municipalities were empowered to enter the Participants' Agreement under the statutes and constitution of the State of Oregon.

In *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I to Petition for Certiorari), *cert. denied*, 105 S. Ct. 219 (1984), the Idaho Supreme Court determined that Idaho municipalities lacked authority under the Idaho Constitution to enter the Participants' Agreement and declared the Agreement void and *ultra vires* as against five Idaho municipalities. Petitioners in the instant case also sought a writ of certiorari in the *Asson* case on constitutional grounds almost identical to those raised here. This Court denied that petition.

Finally, the Supreme Court of Wyoming also considered the validity and enforceability of the Participants' Agreement against two electric cooperatives in Wyoming. The Wyoming Public Service Commission had prohibited those cooperatives from making payments under the Participants' Agreement because the Agreement had not been approved by the Commission. The Commission also found that the dry-hole provisions of the Agreement violated the Wyoming requirement that utility rates may include only the costs of facilities that are in fact "used or useful" to the public. Upon appeal, because the Wyoming Supreme Court agreed with the Washington Supreme Court that the lack of authority of Washington municipal participants rendered the Agreement invalid and unenforceable against all remaining participants, it determined that appeal of the Wyoming Public Service Commission's determination was moot. *Pacific Power & Light Co. v. Public Service Commission*, 677 P.2d 799 (Wyo.) (Appendix to Petition for Certiorari at

H-10), *cert. denied*, 105 S. Ct. 120 (1984).

Role of Bonneville

Also related to this litigation are two lawsuits filed in the United States Court of Claims by a number of participants in Projects 4 and 5 against Bonneville for breach of duties imposed upon it under federal law and under its power sales contracts. *Benton County Public Utility District No. 1 v. United States*, Nos. 590-82C, 514-83C (Ct. Cl. filed Nov. 15, 1982); *Public Utility District No. 1 of Clallam County v. United States*, No. 29-83C (Ct. Cl. filed Jan. 17, 1983). Specifically, the plaintiffs allege that Bonneville's actions undertaken to seduce utilities to sign the Participants' Agreement constitute a breach of its statutory and contract obligations to provide preferential treatment to public utilities that qualify as preference customers.

Bond Purchasers' Actions for Fraud

The most significant related litigation is a group of lawsuits filed in federal and state courts by Chemical Bank and purchasers of Project 4 and 5 bonds against the Supply System, the Supply System's directors, the Supply System's bond counsel, the Supply System's financial advisor and accounting firm, the Supply System's engineering and project consultants, the Supply System's managing underwriters, the participants and members of the Participants' Committee, and Bonneville. The Judicial Panel for Multi-District Litigation consolidated approximately two dozen class action lawsuits against these defendants in the United States District Court for the Western District of Washington for litigation of claims based upon the anti-fraud provisions of the federal and state securities laws, common law fraud, misrepresentation, negligence, and other theories of tort. *In re Washington Public Power Supply System Securities Litigation*, M.D.L. No. 551 (W.D. Wash. consolidated Aug. 5, 1983) (hereinafter the "multidistrict litigation"). A class of persons and entities that purchased bonds from March 1, 1977 through January 22, 1982 was conditionally certified for prosecution of the federal securities fraud claims more than a year ago. *Id.*, Order at 3 (Nov. 30, 1983). Almost 100 million pages of documents have been produced during the past two years and depositions on multiple tracks commenced in January of this year.

As an adjunct to the multidistrict litigation, Chemical Bank, as trustee on behalf of all current holders of Project 4 and 5 bonds, filed a similar action alleging almost identical claims. *Chemical Bank v. Public Utility District No. 1 of Benton County*, No. C83-1080 (W.D. Wash. filed Aug. 3, 1983). In addition, M.G.I.C. Indemnity Corporation, which issued loss insurance to a substantial number of investors in Project 4 and 5 bonds, has filed a virtually identical action. *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County*, No. C84-690 (W.D. Wash. filed May 23, 1984). The Chemical Bank and M.G.I.C. cases are proceeding on the same schedule and under the same judge as the multidistrict litigation.

Finally, a group of bondholders who purchased almost one-quarter of the outstanding principal amount of Project 4 and 5 bonds has filed a similar action in the Superior Court of the State of Washington for King County alleging claims against most of the defendants identified above based on reformation of the Participants' Agreement, estoppel, restitution, the Washington State Securities Act, negligence, malpractice and other legal theories. *Haberman v. Washington Public Power Supply System*, No. 84-2-06452-8 (Super. Ct. King County filed May 7, 1984).

This Court should not be misled by the petitioners' casual reference to this securities litigation. It is probably the largest securities and fraud litigation ever pursued. Indeed, it is the proper forum for petitioners to test their allegations of "repudiation."

REASONS FOR DENYING THE WRIT

This Court has reserved its discretionary jurisdiction for issues of great public importance, beyond the academic or episodic, and in which the constitutional issues have been clearly drawn in the courts below. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). None of those factors is present here. Indeed, this case does not even raise a substantial constitutional question.

Investors in bonds issued for the Projects have been disappointed by an unanticipated interpretation of pre-existing state

law that has diminished the return on their investment. Their remedy against the respondents, if any, lies in various securities acts and in tort. Indeed, they are actively pursuing those claims in federal district court. Whatever the outcome of that related litigation, there has been no taking of property without just compensation, and there has been no violation of due process in this proceeding. This case turns completely on interpretation by state courts of state enabling statutes and contract rights. It involves no constitutional question.

1. *No Question Arises Under the Takings Clause.*

This case does not involve a question of taking. Whether a taking has occurred depends largely upon the particular circumstances in each case. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). This Court has identified several considerations that have particular significance in making the ad hoc, factual inquiry that is needed to determine whether a compensable taking has occurred. *Id.* at 124-25. However, before engaging in that inquiry, a court must look for the existence of a legitimate property interest and a governmental appropriation of that property for public use. Neither is present in this case.

Obligations arising under *valid* and *enforceable* contracts may be property within the meaning of the takings clause. *Lynch v. United States*, 292 U.S. 571 (1934). *See also Armstrong v. United States*, 364 U.S. 40 (1960). However, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) *(quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also United States v. Causby*, 328 U.S. 256, 266 (1946) (the meaning of "property," as used in the Fifth Amendment, "will normally obtain its content by reference to local law") (citation omitted).

The Washington Supreme Court determined that under state law the Participants' Agreement is not a valid contract. That being so, neither the Supply System nor the present holders of its bonds have a cognizable Fifth Amendment property right in the Agreement. Instead, the bondholders have only a unilateral

expectation that the Participants' Agreement should be performed. "But a mere unilateral expectation . . . is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Nor has there been any governmental appropriation for public use. The petitioners conjure up an image of conspiracy among the participants and the Washington Supreme Court. They sprinkle references to "the governmental participants" among their repeated allegations that participants repudiated their obligations and thereby appropriated bondholder's property. But the participants do not comprise a government. Although some are municipal corporations from several states, the others are private, albeit consumer-owned, corporations organized under various business and corporation statutes of five different states. Moreover, the involvement of the 88 participants in litigation that results in invalidation of a contract is simply not governmental exaction of property for public use.[7]

The only governmental action involved in this case was judicial interpretation of a pre-existing state statute. No legislation or regulations were enacted to exact a forced contribution to municipal revenue. Instead, a statute that existed prior to the bondholders' investment was interpreted in a manner which they had not expected.

(a) *There Has Been No Interference With Reasonable Investment-Backed Expectations.*

Even if there had been governmental interference with a cognizable property right, the bond purchasers would not be entitled to compensation for that interference under the factors identified by this Court to assist in determining whether compensation is due. First, " '[a] reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862,

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7. This is even more obvious in light of the many different positions taken by the 88 participants in state court with respect to various issues concerning the Participants' Agreement. The participants are by no means a homogenous single-minded group.

2875 (1984) (*quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Here, institutions and persons who purchased Supply System bonds in order to obtain their high tax-exempt yields knowingly assumed an investment risk.[8] The bond purchasers' "investment-backed expectations" were specifically qualified by written statements and opinions both on the bonds themselves, and on the accompanying investment prospectus. Those opinions warned that bondholders' rights were subject to "judicial discretion," "principles of equity," and "exercise of the sovereign police powers of the State of Washington."[9]

Moreover, many bond purchasers were actually aware of the investment risk. For example, a class representative in the multidistrict securities litigation testified that she knew that her investment involved risk; indeed, she even acknowledged that she was willing to take a higher risk in order to obtain the higher yields offered by Supply System bonds.[10] Some investors even decided to obtain insurance against any loss caused by realization of the risk.[11] Clearly, many purchasers of bonds on whose

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8. Petitioners admit that bondholders assumed certain risks such as the insolvency of the participants. Petition for Certiorari at 7. However, they decline to identify the other risks inherent in debt securities which the bondholders knowingly and voluntarily assumed.

9. The Official Statements issued in connection with each issue of bonds prior to the 1979B series included legal opinions that warned that "the obligations of the parties to said Participants' Agreement . . . and the enforceability thereof under the same may be subject to general principles of equity which permit the exercise of judicial discretion and to valid bankruptcy, insolvency, reorganization, moratorium and other laws for the relief of debtors." 1979A Official Statement at E-3.

Commencing with the Official Statement for the 1979B series, bond purchasers were warned that enforceability of the Participants' Agreement was subject to "judicial discretion, the valid exercise of sovereign police powers of the State of Washington, and of the constitutional powers of the United States of America, and valid bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors' rights." 1979B Official Statement at D-3.

Moreover, the same warning, applied to "the rights of the holders of said bonds," appeared on the bonds themselves. Series 1980E $5,000 bond, 11.75% due July 1, 2010, CUSIP 939821 LC6.

10. The pertinent excerpt of that testimony is reprinted in Appendix A to this brief.

11. The M.G.I.C. action, described above, was commenced by a major investment insurer that insured the bonds of some purchasers.

behalf petitioners seek this petition were fully aware of the risks inherent with their investment.[12]

Furthermore, the reasonable investment-backed expectations of purchasers of bonds are necessarily encumbered with the risks inherent in any investment security, including the issuer's ability to transact business, enforce contracts, and pay its obligations. Laws that exist when a contract is formed become a part of that contract, as if they were expressly incorporated in its terms. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U.S. 632 (1912); *Minish v. Hanson*, 64 Wash. 2d 113, 390 P.2d 704 (1964). Hence, the obligation of a contract cannot be impaired by laws in force when the contract was made, because it is presumed that the contract was made in contemplation of these existing laws. *Minish*, 64 Wash. 2d at 115, 390 P.2d at 705. Furthermore, "private parties dealing with a government agency are charged with knowledge of the agency's authority." *Noel v. Cole*, 98 Wash. 2d 375, 379, 655 P.2d 245, 248 (1982). *See also* 10 E. McQuillin, *The Law of Municipal Corporations* § 29.104c (3d ed. 1981) ("[N]otice [is] imputed to all persons dealing with a municipal corporation of the limits of its powers . . .").

This Court has long applied this rule to purchasers of municipal bonds:

> We may repeat here what was said in *Anthony v. Jasper Co.*, 101 U.S. 697, that purchasers of municipal bonds 'are charged with notice of the laws of the state granting power to make the bonds that they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created.'

Northern National Bank v. Trustees of Porter Township, 110 U.S. 608, 618 (1884). *Accord Moore v. City of Nampa*, 276 U.S. 536,

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12. As trustee for the bondholders, Chemical Bank represents persons who purchased after challenges to the Participants' Agreement were made and even after the Agreement was adjudged invalid. Surely those investors cannot make a credible claim that their property was taken. Indeed, such a determination would result in millions of dollars of windfall profits for speculators who continue to trade in bonds for the Projects.

541 (1928); *Barnett v. City of Denison*, 145 U.S. 135, 139 (1892); *Merchants Exchange National Bank v. Board of Chosen Free Holders*, 115 U.S. 384, 390 (1885). Professor Williston has also summarized the rule:

> Holders of municipal bonds are held in law to know, and are chargeable with constructive knowledge of, constitutional and statutory provisions bearing on the authority to issue bonds. Therefore, though negotiable in form, such bonds are subject to certain defenses, as for instance that the issue is *ultra vires* and therefore void even in the hands of an innocent purchaser.

1 *Williston On Contracts* § 220B (3d ed. 1957).[13]

In this case, the bond purchasers are not entitled to compensation because their property rights were subject to an investment risk which they are charged by law to bear, and which they knowingly assumed. The Constitution does not guarantee that investment risks will not materialize into investment losses.

(b) *There Has Been No Governmental Action Characteristic Of Taking.*

Analysis of the second factor identified by this Court—the character of the governmental action—also suggests that compensation is not required. The only governmental action involved in this case is judicial interpretation of a pre-existing law. The Washington Supreme Court decision did not transform bondholders' investment expectations into public property. Instead, that court merely interpreted state statutes which

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13. In *Washington v. Maricopa County*, 152 F.2d 556 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1946), the State of Washington had purchased municipal bonds issued by Maricopa County, Arizona. Pursuant to a statute requiring the county to recall and reissue bonds if interest rates dropped substantially, Maricopa County called the bonds prior to the maturity date stated on the face of the bonds. When the State of Washington claimed that Maricopa County was obligated to pay interest on the bonds at the agreed rate until maturity, the federal district court rejected that claim. In affirming that judgment, the Ninth Circuit Court of Appeals stated:

> [P]urchasers of municipal bonds are bound, at their peril, to take notice of the existence and terms of the law from which it is claimed the power to issue them is derived .... *At bottom the estoppel argument is that appellants were misled because some of the statutes referred to in the bonds were subsequently construed in a manner different from that in which appellants think they should be construed. That, however, is a peril which the purchaser necessarily assumes* ...

Id. at 561 (citations omitted) (emphasis added).

circumscribe authority of municipal corporations, and found that a contract was invalid and *ultra vires* as to those municipal corporations.

Invalidation *ab initio* of *ultra vires* municipal contracts has long been regarded as necessary to protect citizens from government's unlawful or unjust contracts, and to maintain the integrity of a governmental system under which the powers of municipal corporations are limited to those directly conferred by the legislature. *See Noel v. Cole*, 98 Wash. 2d 375, 378, 655 P.2d 245, 248 (1982). The decision below was not a physical invasion by government to exact a forced contribution. Rather, it was merely judicial interpretation of the limitations imposed upon government in order to "[adjust] the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. . . . 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'") *(quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

Moreover, this Court has acknowledged that a state "might properly make 'a choice between the preservation of one class of property and that of the other'" and does not exceed "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 126 (1978) (brackets original) *(quoting Miller v. Schoene*, 276 U.S. 272, 279 (1928)). Consequently, in interpreting the state statutes that circumscribe authority of municipal corporations, the Washington Supreme Court was entitled to give effect to the legitimate state policy of protecting citizens subject to the governance of municipal corporations from ill advised or *ultra vires* contracts, even if advancement of that policy would have an impact on private parties who not only were charged with knowing the limits of municipal author-

ity but also willingly undertook that investment risk.

(c) *The Extent of Diminution in Value is Uncertain.*

Even the third factor identified by this Court—the extent of diminution in value—is still unresolved in this case. Although the Participants' Agreement has been declared invalid, bond purchasers still retain the contract rights embodied in the bonds themselves. In fact, in the multidistrict litigation, bond purchasers are suing the Supply System on those bonds, and their attorneys have publicly stated their intent to pursue all assets of the Supply System, including Projects 1, 2, and 3. Moreover, the bond purchasers' money was not squandered—it was converted into assets, many of which have substantial value. Two large turbine generators and other nuclear generation equipment may bring hundreds of millions of dollars for distribution to the bondholders.[14] Finally, even the pendency of related litigation against the respondents and other defendants leaves open the possibility of future recovery by bond purchasers and could restore the value of their bonds. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 (1977). *See generally Andrus v. Allard*, 444 U.S. 51 (1979).

Finally, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), relied on by the petitioners, simply does not reach this case. This Court expressly restricted its holding to "the narrow circumstances of [that] case," *id.* at 164, where the county clerk retained interest earned on an interpleader fund despite the existence of separate statutes that established creditors' rights to that fund and specifically set the clerk's fee as a percentage of the amount of the fund. In *Webb's*, there was a distinct basis in state law to establish a property right. Here there is none. In *Webb's*, the Florida legislature exacted from a bulk sales purchaser a forced contribution to municipal revenues as a condition of obtaining statutory protection from creditors' claims. Here, the only statute at issue was a municipal enabling statute that was interpreted more narrowly than the bond-

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14. As of June 30, 1984, Chemical Bank held approximately $117,324,000 in several accounts on behalf of the bondholders. Disposition of assets of Projects 4 and 5 continues under Chemical Bank's supervision. Chemical Bank, Bond Fund Trustee, *Report to Bondholders* (Oct. 1984).

holders had anticipated—a risk that bondholders voluntarily assumed when making their investment. *Webb's* involved a court enforcing a legislative enactment that took money for public use. This case involves only a court's interpretation of statutes that impose limits on government.[15]

There is no issue under the Takings Clause. The writ should be denied.

2. *No Question Arises Under the Due Process Clause.*

The due process questions raised by petitioners are also a mirage. Petitioners claim that bondholders were denied due process because the state court retroactively manipulated state law and thereby denied petitioners notice and an opportunity to be heard on critical factual issues. Petitioners also complain that bondholders were denied their right to an impartial tribunal. Neither of these arguments has merit.

First, the decision below was not a retroactive manipulation of state law. In evaluating the authority of municipal corporations to enter into certain joint arrangements, the Washington courts had on prior occasions specifically considered the need for ownership and control. In *Roehl v. Public Utility District No. 1 of Chelan County*, 43 Wash. 2d 214, 261 P.2d 92 (1953), a joint purchase agreement under which five public utility districts acquired some substantial utility properties was upheld against a ratepayer's challenge that the agreement was *ultra vires* and void. The court based its holding in part on its determination

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15. As *amicus curiae*, the Public Securities Association ("Association") attempts to expand the issues on appeal by arguing that the Washington court violated the Contract Clause by effectively implementing a statute enacted after the Participants' Agreement was signed. Brief for the Public Securities Association as *Amicus Curiae* in Support of the Petition at 19. However, the Contract Clause applies only to legislative enactments. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924). A judicial decision enforcing a legislative impairment of contract may be reviewed under the Contract Clause only if the decision "could not withstand judicial analysis independent of the legislation allegedly implemented." *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975). Here, the Association admits that the Washington court did not expressly rely on the statutory provision it alleges was implemented. Indeed, the statute had no application to the particular authority question before the court. The court's decision, therefore, does not present a question cognizable under the Contract Clause.

that under the agreements each public utility district had joint ownership and retained sufficient control and management by means of a joint executive board.

In *Public Utility District No. 1 of Snohomish County v. Taxpayers of Snohomish County*, 78 Wash. 2d 724, 479 P.2d 61 (1971), taxpayers challenged the authority of Snohomish PUD to participate in the construction, operation, and financing of a coal-powered electric generating plant with four investor-owned utilities. Unlike the Participants' Agreement, which gave the Participants' Committee narrow powers of disapproval leading to referral to an arbitrator, this joint participation agreement required affirmative approval by 75% of the ownership interests of the project's yearly operating budget, and unanimous approval for additional capital expenditures.[16] Furthermore, acting as agent to construct and operate the facility, one of the investor-owned utilities was given only those powers necessary for ordinary plant operation. Based upon careful examination of the agreements, the court found that the "ownership interests [of the PUDs] are amply protected by the terms and conditions of the agreement" and that "[m]ajor management decisions are made by all participants, with the public participants having veto power." *Id.* at 727, 728, 479 P.2d at 63. It is clear, therefore, that precedent existed for an inquiry into provisions of the agreement governing control for the purpose of considering whether Washington cities and PUDs possessed authority to enter the Participants' Agreement.

Despite this existing precedent, the petitioners argue that bondholders were unfairly surprised by the ruling below and therefore deprived of notice and an opportunity to be heard on a critical factual inquiry into participants' control over the Projects. The petitioners are clearly wrong on this issue. Whether municipalities possessed authority to enter the Agreement is a question of law—not fact. Determinations of law do not need an evidentiary hearing. Moreover, the petitioners had a full opportunity to present and argue their analysis and interpretation on this question of law.

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16. In the *Snohomish County* case, municipal corporations owned 28% of the project and privately-owned corporations owned 72%.

It is axiomatic that a court must evaluate the authority to enter into a contract as of the time the contract was formed. Even the petitioners asserted below that "in evaluating the authority to enter into a contract with a 'dry-hole' provision . . . authority must be evaluated at the time the contract was formed." Respondents' Brief 2 of 3: Memorandum . . . Re Authority Issues at 42, *Chemical Bank I* (Feb. 14, 1983).[17] The Washington Supreme Court did exactly that. In both of its opinions, it focused its inquiry on the four corners of the Participants' Agreement to determine whether Washington cities and municipalities possessed authority to enter that agreement at the time it was formed:

> *[W]e will examine the present agreement* to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest. In the present case, *several provisions of the agreement* limit the participants' role in management to an extent inconsistent with control of any facilities required or constructed.
>
> . . . .
>
> Here, the municipal and PUD participants were not acquiring or constructing generating facilities as set out in the statutes because *under the agreement* they ceded virtually all of their ownership interests and most of the management responsibilities to WPPSS.
>
> . . . .
>
> Applying the language of the acquisition or construction statutes and the principles derived from the cases construing that language, we do not believe the participants retained sufficient ownership interests or management responsibilities *under this agreement* to constitute acquisition or construction of an electric generating facility.

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17. The petitioners also argued below that "the Agreement must be analyzed as of the time of its execution, . . . not at a later time when the termination contingency occurs. . . . The [participants] would, instead, have the court undertake this analysis retrospectively." *Id.* at 28.

The petitioners have now performed a complete turnaround by asking this Court to view with hindsight the actions of the Participants' Committee after the termination contingency occurred in order to see whether the Committee had sufficient control for the municipalities to have had authority to enter the Agreement.

Chemical Bank I, 99 Wash. 2d at 787, 788, 791, 666 P.2d at 337-338, 339 (Appendix to Petition for Certiorari at B-14, 16, 18) (Emphases added):

> Our reevaluation of the statutory authority question thus leads us once again to the conclusion that the participants' agreement did not grant ownership control as contemplated by this statutory scheme.

Chemical Bank II, 102 Wash. 2d at 894 (Appendix to Petition for Certiorari at A-20).

Moreover, the petitioners themselves conceded that "the language of the agreements is clear" and that "where, as here, both sides moved for summary judgment on interpretation of the agreements, the Superior Court properly ruled on the contract interpretation issue as a matter of law and without considering extrinsic evidence." Respondents' Brief No. 3 of 3: Brief of Chemical Bank Re: Contract Interpretation at 63-65, *Chemical Bank I* (Feb. 14, 1983). They now ask this Court to consider extraneous evidence as to certain provisions in the Participants' Agreement.

Interpretation of the Participants' Agreement, including its provisions for control, is a question of law. *Chemical Bank II*, 102 Wash. 2d at 894 (Appendix to Petition for Certiorari at A-20) (*citing Kelly v. Aetna Casualty & Surety Co.*, 100 Wash. 2d 401, 670 P.2d 267 (1983)). No evidentiary hearing was required to determine a question of law based upon concededly unambiguous provisions of the Participants' Agreement and statutes then in effect. All other extraneous evidence that petitioners now present to this Court was and still is irrelevant to the question of authority to enter the Participants' Agreement.

Due process requires a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). No single form of procedure is dictated by due process; instead, the guarantee is one of fairness in the process by which rights are determined. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Since authority of a municipal corporation to enter an agreement is a legal question to be determined as of the time the agreement is entered, petitioners were not entitled to an evidentiary hearing. Instead, they were given ample opportunity to present their arguments, sup-

ported by whatever affidavits or exhibits were necessary. Indeed, the petitioners fully presented their arguments in the proceedings below.

Finally, the bondholders were not deprived of an impartial tribunal. The overwhelming majority of courts that have considered this issue have determined that the interest of a ratepayer is not a substantial, direct, and pecuniary interest that warrants recusal. *E.g., In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976). In fact, the two federal appellate courts to have considered the issue reversed district judges' decisions to recuse themselves, even though recusal is highly discretionary. *See id.* Being a ratepayer does not entail the type of pecuniary interest that is disqualifying. As the Tenth Circuit Court of Appeals stated in *In re New Mexico Natural Gas Antitrust Litigation*,

> The ratemaking proceedings of public utility commissions throughout the nation are reviewed by the courts in the states involved, where most of the reviewing judges are customers of the telephone, electric, water or gas company; yet there is no suggestion in any cases we have seen that these judges should disqualify themselves.

620 F.2d at 797.[18]

3. *Review of This Case Would Constitutionalize Every Case Involving Municipal Default, Fraud Claims Against Municipal Corporations or Judicial Determinations of Municipal Authority.*

In this case, a state court was asked to determine whether state

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18. The reasoning behind this rule was stated in *Pennsylvania Power & Light Co. v. Gulf Oil Corp.*, 270 Pa. Super. 514, 411 A.2d 1203, 1214 (1979), *cert. denied*, 446 U.S. 966 (1980):

> [T]he proof did not demonstrate that a venireman will immediately get a sum certain but only that a venireman who remains [the utility's] customer may over a period of years receive some benefits in the form of reduced electric rates. This interest, unlike the interest of an employee or shareholder of a corporation, is much like the interest of taxpayers whose taxes might be affected by their judgment as jurors in a case involving the county: 'Too shadowy, indirect, remote and contingent to be within the rule that a man cannot be a judge in his own case.'

(citation omitted).

enabling legislation of cities and public utility districts included a grant of power to enter a complex financing arrangement for the construction and operation of two nuclear generating plants. The court held that the enabling legislation did not include authority to enter such an arrangement, and that the contracts signed by certain Washington municipal participants were *ultra vires* and void *ab initio* under well-established principles of municipal law. Then, with 70% of the contractual undertaking lacking, the court interpreted the contract not to require performance by the remaining 30% of participants' shares.

This case involves only judicial interpretation and application of state law on issues where state law is to be applied. Even if the state court's decisions were wrong, this Court does not sit to correct errors of the state courts in the interpretation of state law. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Sauer v. City of New York*, 206 U.S. 536 (1907).

The petitioners' allegations do not constitute constitutional claims—they are allegations of fraud. Petitioners repeatedly characterize their constitutional claims in terms of "promises," "assurances," and "pledges" by participants who, they allege, "abruptly reversed their prior position" and "repudiated those same assurances." Petition for Certiorari at 3, 4, 6, 8, 16. Stripped of the constitutional rhetoric, the petitioners' claims are clearly based on fraud.[19] Moreover, a remedy for common law and securities fraud is exactly what the bondholders have

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19. The petitioner's taking claim is based upon the misleading premise that the Washington municipal participants "repudiated" their obligations. Likewise, the arguments in various *amicus curiae* briefs rest upon the same allegations of repudiation. *See, e.g.*, Brief *Amicus Curiae* of Salomon Brothers, Inc.; Smith Barney, Harris Upham Co., Incorporated; Prudential-Bache Securities Inc.; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated in Support of the Petition for a Writ of Certiorari at 1 and 7; Brief for the Public Securities Association as *Amicus Curiae* in Support of the Petition at 9; Brief for the American Bankers Association, the New York Clearing House Association and the Securities Industry Association as *Amici Curiae* at 1. There is no support whatsoever in the proceedings below for that allegation and the Nine Respondents vigorously deny that the participants repudiated their obligations under the Participants' Agreement. Such unsupported and argumentative allegations of repudiation do not form the kind of factual basis that this Court normally requires for adjudication of a constitutional issue. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

been pursuing for almost two years in the multidistrict litigation.

If this case involves a constitutional question, it is hard to imagine a case that does not. Granting a writ to review this case would implicate the Fifth Amendment in every case involving a municipal securities default or a claim of fraud against a municipal defendant. Granting a writ would inject taking and due process questions into every limiting interpretation of municipal enabling legislation. Review of this case would constitute a serious attack on doctrines of municipal law that place limits on government to protect its citizenry. Review of this case could even constitutionalize every determination of law made by a state court on the basis of unambiguous provisions of a contract, simply because it did not follow an evidentiary hearing on extraneous matters.

CONCLUSION

Litigation over the termination of Supply System Projects 4 and 5 will undoubtedly occupy many hours of judicial time in state and federal courts across the nation. The bondholders on whose behalf petitioners file this Petition are vigorously pursuing their claims based upon fraud and negligence against respondents and other defendants. Indeed, this Court may have another opportunity to consider the petitioners' allegations within the context of other federal claims being pursued by the bondholders.

This Court should not, however, accept review of this case. No substantial constitutional issues are present, and granting review would signal a dramatic departure from the limits of constitutional jurisprudence carefully defined by this Court in the past.

For these reasons, the Nine Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Deposition Testimony of Rosalyn Mirotznik
Plaintiff and Class Representative
Given on January 28 and January 29, 1985

In re Washington Public Power Supply System Securities Litigation,
M.D.L. No. 551 (W.D. Wash.)

. . . .

Q. Am I right in reading these two documents as representing that on November 8, 1982 you sold a New York City General Obligation bond referenced in transaction number 38290—

A. Yes.

Q. —and you purchased a Washington Public Power Supply System Project 4 and 5 revenue bond on the same date?

A. Right.

Q. Am I right?

A. Right.

Q. Now, take a look at the yield of the New York City bond which you sold.

What is that yield?

A. 11.116 percent.

Q. What is the yield of the WPPSS bond that you bought the same day?

A. 15.500 percent.

Q. You were, of course, aware of what the yields of the two instruments were on the date of these transactions, were you not?

A. Yes.

Q. Now, what does it mean to you that the WPPSS bond had a yield which was more than 4 percentage points higher than the New York City bond?

MR. STIEFEL: Objection

Go ahead.

A. Well, I would say that at this date, when I bought this and I sold—when I sold the New York City and I bought the Washington, the higher percent reflects the fact that this was getting, I guess, a little more risky.

Q. Do you believe in your own mind that the higher the yield of a security, the higher the risk of that security?

MR. STIEFEL: Objection.

Answer.

A. Probably.

Q. Would you say in most cases that's true?

A. Probably.

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Transcript at 141-143.